90-1569

Supreme Court, U.S.
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NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES

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OCTOBER TERM, 1990

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FLEMING LANDFILL, INC. AND JOHN T. FLEMING,

Defendants-Appellants,
Petitioners,

v.

JULIAN GARNES AND SHARON GARNES,

Plaintiffs-Appellees,
Respondents.

ON CERTIORARI TO THE
SUPREME COURT OF WEST VIRGINIA

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# RESPONDENTS' RESPONSE TO PETITION FOR WRIT OF CERTIORARI

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## II. STATEMENT OF THE CASE

The respondents believe that the statement of the procedural history of this action provided by the petitioners is essentially accurate.

It does, however, give inadequate attention to the review of the jury award of punitive damages. The trial court opinion (Appendix pp. 3-8) reviewed the jury award under long established West Virginia law on punitive damages and determined that the jury was properly instructed in West Virginia law and that the award of punitive damages was proper.

While the West Virginia Supreme Court of Appeals did not write an

opinion, it did refuse the appeal "on the merits." (Appendix pp. 1-2).

The statement of facts provided by the petitioners, while literally true, is misleading because it fails to fully describe the manner in which the Fleming Landfill operated. Although it is literally true that the respondents and one other person were the only residents who testified concerning the operation of the landfill, it is also true that the West Virginia Department of Natural Resources had consistently complained about the manner in which the landfill operated and its failure to comply with West Virginia regulations concerning the operation of a landfill.

In 1978, the respondents began operating a dump across the road from the respondents' home. When the West Virginia Department of Health authorized the operation of the dump, it set out in that authorization the types of waste which the Fleming Landfill could accept; this list did not include medical or hazardous waste.

From the very beginning, the landfill caused problems. Inspectors from the Department of Health repeatedly noted violations of Health Department regulations at the Fleming Landfill.

After repeated warnings over a period of several years, on April 21, 1982, the West Virginia Department of Health ordered the

respondent John Fleming to cease and desist receiving and depositing solid waste at the landfill and to cover all exposed waste immediately. As a basis for this order, the Department of Health cited, among other things, uncovered waste from previous days, an inadequate (or non-existent) leachate[1] collection or treatment system, pollution of a stream, and a host of other problems. (Appendix pp. 9-12). The record contains no evidence that the cease and desist order of April 21, 1982, was ever lifted.

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[1]Leachate is the liquid that results from water flowing through and out of the garbage. Because the water has been in contact with the garbage, it typically contains large concentrations of a variety of pollutants.

In May, 1982, and June, 1982, representatives of the West Virginia Department of Health contacted the respondents to inform them that the landfill was still not in compliance with West Virginia statutes and regulations.

In 1983, the West Virginia Department of Natural Resources assumed responsibility for the regulation of landfills. Soon after they gained this authority, inspectors from the West Virginia Department of Natural Resources inspected the landfill and discovered that landfill operations were being conducted and there were

approximately thirty-five days'[2] worth of uncovered garbage.

1985 and 1986 presented an unbroken string of violations[3] of Department of Natural Resources' regulations. According to the evidence of record, they were as follows:

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[2]Regulations require that the garbage be covered at the end of every day.

[3]From this series of inspections by the Department of Natural Resources, one might infer that the cease and desist order was rescinded and the landfill was allowed to reopen. It should be remembered that the Department of Natural Resources assumed responsibility to regulate landfills from the Department of Health at about the time of the revocation. This transfer may have created some confusion about the status of the Fleming Landfill permit. In any event, the respondents presented no evidence to show that the revoked permit was ever reinstated.

Mar. 21, 1985: Department of Natural Resources inspected and found piles of garbage, polluted water, blackish grey stream.

May 14, 1985: Department of Natural Resources inspected. Found mountain of garbage, flies everywhere.

June 3, 1985: Certified letter from Department of Natural Resources cites lack of cover, feeding and breeding of disease-carrying vermin.

June 11, 1985: Department of Natural Resources inspected and found 20 days worth of garbage. Flies and bad odor present.

June 19, 1985: Inspection by Department of Natural Resources finds "mountains of garbage" uncovered. Flies and odor very bad.

Feb. 4, 1986: Department of Natural Resources inspected and found thirty days of garbage uncovered. Smells present.

Mar. 17, 1986: Letter from Department of Natural Resources citing lack of cover, presence of vermin.

Mar. 27, 1986: Department of Natural Resources inspection finds the same pile that was uncovered at last inspection is still uncovered. 30-60 days of garbage. Department determined that the landfill needs more equipment if they are going to take in this much garbage.

Apr. 24, 1986: Department of Natural Resources inspects and finds foul discharge from ponds, flies, and odors. Three days uncovered garbage present.

May 7, 1986: Department of Natural Resources inspects and finds 3-5 days of garbage uncovered. Discharge to stream. Diversion ditch not installed properly. Water samples taken by the Department of Natural Resources show high bacteria, iron, phenol, iron in water coming from landfill.

July 9, 1986: Department of Natural Resources inspects and finds a large mound of garbage. Large dozer out of service and small one cannot keep up. Creek black below fill.

Aug. 7, 1986: Department of Natural Resources inspects and finds both dozers broken.

> Mound of garbage has tripled. Odor and flies. Stream still black.

After years of noting violations and sending the Fleming Landfill certified letters with no apparent effect, the West Virginia Department of Natural Resources sued the respondents in the Circuit Court of Kanawha County, Civil Action No. 86-C-3918. This was on October 3, 1986.

On October 7, 1986, the Department of Natural Resources inspected the Fleming Landfill. Although the landfill was still not in compliance, it had only two days of uncovered garbage. This was a considerable improvement over the mountains of uncovered garbage which had been present before the action

was instituted. The inspector did note evidence of stream pollution during that inspection.

In December, 1986, the Department of Natural Resources inspected the operation and found that the garbage was still not being covered and the discharge from the landfill was causing the stream to change colors.

On February 25, 1987, the West Virginia Department of Natural Resources entered into a consent order in Civil Action No. 86-C-3918. The consent order required the Fleming Landfill to take the various steps to correct problems with the landfill.

In May, June, and July, the Department of Natural Resources

inspected the Fleming Landfill. Although the problem with covering the garbage had been partly corrected, the covering still was not being done in accordance with the regulations. On each of these inspections, the inspector noted the presence of odors.

On August 18, 1987, the Department of Natural Resources moved for an order holding the Fleming Landfill in contempt. By order dated August 18, 1987, the Court held the Fleming Landfill in contempt for failure to comply with the Court's previous Order.

On December 24, 1987, the respondents initiated the present action in the Circuit Court of Kanawha County. They asked that the

operation of the landfill be enjoined both for violations of statute and because the landfill was a nuisance.

During the period between the filing of the suit and the trial (October-November, 1988), the Department of Natural Resources continued to note violations such as water pollution, odors, and inadequate cover. Through at least the time of the trial, the conditions at the landfill remained the same.

From 1982 until the present date, as far as the record is concerned, the respondents' landfill did not and does not hold a permit from the West Virginia Department of

Natural Resources for the disposal of solid waste.[4]

Even though it routinely discharges leachate water into the waters of West Virginia, the respondents' landfill has never held and presently does not hold the required water discharge permit to do this from the West Virginia Department of Natural Resources.

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[4]At one time, the respondents held a permit from the West Virginia Department of Health. The authority to operate under that permit was apparently revoked on April 21, 1982, and there is no indication that the permit was ever reinstated. Even if that permit was reinstated at some later date, there was never any permit issued by the West Virginia Department of Natural Resources. The West Virginia Department of Natural Resources assumed responsibility for the regulation of landfills from the West Virginia Department of Health in 1983.

Even though the Fleming Landfill has in the past taken hazardous waste, it has never in the past and presently does not hold the required permit from the Department of Natural Resources which would authorize it to take hazardous waste.

Even though the Fleming Landfill has in the past taken medical waste, it has never in the past and presently does not hold a permit which would authorize it to accept medical waste.

## III. SUMMARY OF ARGUMENT

This Court has recently resolved the issues presented in this case. Pacific Mutual Life

Insurance Company v. Haslip, 59 U.S.L.W. 4157, March 4, 1991.

To the extent that the present case differs from the Haslip case the facts in the present case show the punitive damage award to have been more reasonable and the jury to have been provided more guidance in assessing those damages.

To the extent that other sanctions which the State of West Virginia is authorized to impose for conduct similar to that of the petitioners is relevant, the punitive damages imposed in this case are considerably less than the civil penalties which the State of West Virginia would be authorized to impose on the Fleming Landfill for its conduct.

## IV. ARGUMENT

### A. The punitive damages assessed in this case satisfy any test of constitutional reasonableness.

To the extent that the constitutional standard against which punitive damages are to be measured is one of reasonableness, the punitive damages imposed in this case would satisfy that test. Although what is considered to be reasonable would always be somewhat subjective, the punitive damages imposed in this case are certainly as reasonable as those which the United States Supreme Court has considered in recent years. In Pacific Mutual Life Insurance Company v. Haslip, supra, the Supreme Court considered an award of

punitive damages of $840,000 for a single incident as not being unreasonable as a constitutional matter. Although there is no bright line that circumscribes what is constitutionally acceptable, it seems unlikely that an imposition of punitive damages of $105,000 for a course of illegal conduct carried on over a several year period in defiance of orders from regulatory agencies would be considered unreasonable as a constitutional matter.

Even the issue which the petitioners seem most anxious to present--whether it is constitutionally acceptable to have an award of punitive damages when there is no award of compensatory

damages--is not squarely presented by the record in this case. Although the jury did not award any compensatory damages, it did find that the landfill was a nuisance. From this it is apparent that the jury believed that there was damage at large although the jury apparently also believed that the plaintiffs should not be compensated for that damage.

So far as the defendant is concerned, it does not matter who is the recipient of the sum which was imposed upon him as punishment. Since the purpose of punitive damages is punishment, it is irrelevant to the defendant whether the punitive damages go to the state or some private person. The

defendant's interest is in not being punished unreasonably, an interest which was satisfied here.

As the trial court pointed out in its opinion, this is entirely consistent with settled West Virginia law. West Virginia law recognizes that the purpose of punitive damages is punishment. With such a purpose, punitive damages may be assessed without an award of compensatory damages. Wells v. Smith, 297 S.E.2d 872 (W.Va. 1982).

The jury was specifically instructed to consider, among other things, "the extent of harm inflicted." Although it is impossible to know the jury's thinking, it is reasonable to infer

from this record that the jury considered the actions of the Fleming Landfill, including the persistence of that landfill in that course of action in spite of repeated warnings by regulatory officials, to be so outrageous that punitive damages were appropriate even if the specific harm suffered by these plaintiffs did not merit monetary damages.

Although the term "reasonable" will always be somewhat subjective, by such objective standards as are available the punitive damages imposed in this case were reasonable. By comparison with civil and criminal penalties imposed by West Virginia law for similar conduct, the punitive damages

imposed in this case are certainly reasonable.

The conduct which is a nuisance in this case is also a violation of the West Virginia Solid Waste Management Act, W. Va. Code 20-5F-1 et seq. and the West Virginia Water Pollution Control Act. W. Va. Code 20-5A-1 et seq. In its opinion, the trial court noted the "ample evidence presented of defendant's failure to comply with State regulatory provisions." (Appendix p. 5).

Operation of the landfill without any authorization since 1982, as the defendant has been, would subject the petitioners to a

maximum civil penalty of $10,000 per day. W. Va. Code 20-5F-6.[5]

Even if the Fleming Landfill had the bare legal authority to operate, its conduct over the 10-year period preceding the trial in this action was replete with violations of the statutes and regulations governing the operation of landfills. These violations would expose the respondents to maximum civil penalties of $10,000 per violation.

In addition to violations of the West Virginia Solid Waste Management Act, the conduct of the Fleming Landfill is also in

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[5]Since the trial in this action, the maximum civil penalty has been increased to $25,000 per day. W. Va. Code 20-5F-6, as amended, 1989.

violation of the West Virginia Water Pollution Control Act, W. Va. Code 20-5A-1 et seq. The record is replete with references to discharges of polluted water into the waters of West Virginia. The inspector for the West Virginia Department of Natural Resources makes repeated references to discharge from the landfill causing the stream to change colors. Water samples taken by the Department of Natural Resources show high bacteria, iron, and phenols in water coming from the landfill. There can be little doubt that the Fleming Landfill had been repeatedly discharging polluted water to the Waters of West Virginia. Such conduct would subject the

petitioners to civil penalties of up to $10,000 per day of violation. W. Va. Code 20-5A-17. In addition violations might also subject the petitioners to criminal penalties and jail sentences. W. Va. Code 20-5A-19.

In short, had the petitioners' conduct been the subject of a civil or criminal enforcement action, the potential penalties would have been several times the punitive damages assessed in this case. To the extent that the West Virginia Legislature has spoken on this subject, this is an indication that the penalty imposed upon the petitioners in this case because of their conduct is reasonable.

B. The jury was given sufficient guidance to satisfy constitutional standards.

In the case of Pacific Mutual Life Insurance Company v. Haslip, supra, the Court considered both the general concept of guidance provided to juries in assessing punitive damages and the specific jury instructions used in that case. As a general manner, the Court held that the terms used in the jury instructions, while giving the jury significant discretion, gave no more discretion than such commonly used terms as "reasonable care," or "due diligence." 59 U.S.L.W. at 4162. The Court concluded that the use of such general terms was constitutionally acceptable.

Thus the general issue of whether it is constitutionally acceptable to give juries only the guidance of general instructions in helping them assess punitive damages has been recently decided by this Court. Furthermore, it has been decided by this Court in a manner which is contrary to the position advocated by the petitioners in this case. There is no reason for this Court to reconsider an issue which it has so recently ruled upon. This is especially true when, as here, addressing the issue would not change the outcome below.

The Court in Haslip also considered the constitutionally of the specific jury instructions used in that case. In Haslip, the jury

was instructed that punitive damages were not mandatory, that the purpose was to deter, and that the degree of wrongdoing was a relevant factor. 59 U.S.L.W. 4158. The Court determined that these instructions gave the jury sufficient guidance to survive a constitutional challenge.

In the present case, the jury instructions provided the jury with even more explicit guidance. In addition to instructing the jury on the purpose of punitive damages and giving general guidance, the Court also instructed the jury that it should "take into consideration all the circumstances surrounding the particular occurrence which is the subject of this litigation,

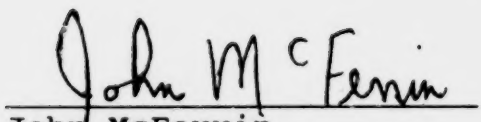
including the nature of the wrongdoing, the extent of harm inflicted, the intent of the party committing the act, the apparent wealth of the defendants, including in each case his or its assets and income as well as any mitigating circumstances."

Such instructions would certainly pass the test for constitutionality of the majority opinion. Even were they to be tested by the stricter standards which Justice O'Connor favors in her dissent, these jury instructions would in all probability pass constitutional muster.

V. CONCLUSION

For the reasons stated above, the respondents request that the petition for certiorari be refused.

JULIAN GARNES and
SHARON GARNES,
Plaintiffs-
Appellees,
Respondents.



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COUNSEL FOR RESPONDENTS

STATE OF WEST VIRGINIA

At a Regular Term of the Supreme Court of Appeals continued and held at Charleston, Kanawha County, on the 10th day of January, 1991, the following order was made and entered:

Julian Garnes and Sharon Garnes, Plaintiffs Below, Appellees

vs.) No. 910088

Fleming Landfill, Inc., and John T. Fleming, Defendants Below, Appellants

Upon an appeal from a judgment of the Circuit Court of Kanawha County, rendered on the 2nd day of February, 1990.

On a former day, to-wit, January 7, 1991, came the petitioners, Fleming Landfill, Inc., and John T. Fleming, by Pauley, Curry, Sturgeon & Vanderford, Arden J. Curry, Arden J. Curry, II, and

David K. Schwirian, their attorneys, and presented to the Court their petition praying for an appeal from a judgment of the Circuit Court of Kanawha County, rendered on the 2nd day of February, 1990. Upon consideration whereof, the Court is of the opinion to and doth hereby refuse said petition on the merits.

A True Copy
Attest: _____
Clerk, Supreme Court of Appeals

January 8, 1990

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405 Capitol Street
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Re: Julian Garnes and
Sharon Garnes v. Fleming
Landfill, Inc. and John T.
Fleming 87-C-4527

Gentlemen:

A number of post trial motions were made by both parties during the months that followed the jury trial herein.

Defendant's motion to set aside the verdict of the jury is primarily based upon the contention that since the jury verdict awarded no compensatory damages to the plaintiff, this Court cannot accept the verdict awarding punitive damages. Indeed, it is defendant's position than an award of compensatory damages is prerequisite

to an award of punitive damages. At the very least defendants maintain that there must be punitive damages. It has been widely held that there is no cause of action for punitive damages alone. 22 Am Jur 2d, Damages, 241, 17 ALR2d 527. The bulk of these rulings simply imply that a jury must consider the cause of action independently of plaintiff's claim for exemplary damages. Some states have ruled that a jury must first award compensatory damages before any punitive damages. West Virginia was long regarded as such a jurisdiction. Toler v. Cossinelli, 129 WV 591, 41 S.E.2d 672 (1942). Recent West Virginia cases reflect a trend away from strict adherence to the "reasonable relation" rule. Wells v. Smith, W.V. 297, S.E.2d 872 (1982), Leach v. Biscayne Oil and Gas Co., W.Va. 289 S.E.2d 197 (1982).

> "...where the jury is properly instructed on the issue of damages, the failure to return an award for compensatory damages should not of itself preclude a punitive award, provided that there is evidence showing an injury to the plaintiff caused by the egregious and tortious conduct of the defendant." Wells v. Smith (Supra)

"Only where the award of punitive damages has no foundation in the evidence so as to evince passion, prejudice or corruption in the jury should the award be set aside as excessive." Wells v. Smith (Supra)

This Court finds that there was ample evidence presented of defendant's failure to comply with State regulatory provisions, either willfully or through wreckless indifference. These regulations were intended to prevent harm such as was alleged in the plaintiff's complaint. Here the jury was properly instructed as to what they could properly consider, including the circumstances surrounding particular occurrences; the nature of the alleged wrongdoing; the extent of any harm; the intent of the alleged committing party; as well as the wealth of the alleged committing party. The jury was also properly instructed that annoyance and inconvenience was to be considered in regards to compensatory damages, if any. There being some admissible evidence covering these points, and the jury having been properly instructed on these matters, the verdict will not be set aside on grounds that no compensatory award was made.

The second major point raised by defendants in support of post

trial motions is that the jury award is excessive. Previous pronouncements of the West Virginia Supreme Court of Appeals relied heavily upon the "reasonable relation" rule. The thinking being that where punitive damage awards remain in proportion to "actual damages done" the possibility that an award might be based on partiality and prejudice is minimized. However, recent rulings of our Supreme Court reflect a trend away from strict adherence of such a rule on the grounds that it would "thwart the punishment purpose of punitive damages in cases where the defendant's conduct has been egregious, but where plaintiff has suffered intermediate or nominal damages. This discourages the plaintiff from bringing the suit and deprives the public from the deterrence of wanton acts." Wells v. Smith, (Supra). The jury considered some evidence of defendant's financial ability.

> "Courts must not set aside jury verdicts as excessive, unless they are monstrous, enormous, beyond all measure, unreasonable, outrageous and manifestly show jury passion, impartiality, prejudice or corruption." Muzelak v. King Chevrolet Inc., 368 S.E.2d (W.V. 1988); Roberts v. Stevens Clinic Hospital, 345 S.E.2d 791 (1986).

The post trial motions to set aside upon this ground is DENIED.

The final matter brought before the Court that requires ruling is the motion of plaintiff for a permanent injunction against the defendant, closing defendant's business, upon grounds that defendant is maintaining a nuisance, and upon all grounds for which plaintiff prayed for damages. The Court notes that damages were sought and an award was secured herein. This Court is also taking into consideration that a temporary injunction was denied by Judge Patrick Casey herein. For this equitable portion of the case the jury sat as an advisory jury and the lack of any compensatory damages is taken into consideration. There was no evidence that the defendant's landfill was situated within a populous municipality; but, to the contrary the evidence is that was constructed in a rural area, without zoning laws. It is the finding of this Court that the statutory laws and regulations do not render the landfill herein to be illegal, nor does any law of this State define it to be a nuisance per se. Furthermore, the verdict of the advisory jury leads this Court to conclude and find that the landfill is not a situation that will likely be a nuisance in the future, if left without Court intervention and not

shut down. The motion for permanent injunction is therefore denied for the greater part, except the defendant is enjoined from allowing mud and debris to accumulate and remain upon the public right of way providing ingress and egress from the landfill herein.

The remaining motions "NOV" and the grounds that they serve are hereby Overruled for the reasons previously expressed in the record in this case.

An order in conformity herewith, will be prepared by this Court incorporating this letter of memorandum of opinion.

Very truly yours,

Herman G. Canady, Jr.,
Judge

HGCJr./ny

April 21, 1982

Mr. John T. Fleming
561 Mundy Hollow Road
Charleston, West Virginia 25312

Dear Mr. Fleming:

You are hereby ordered to cease and desist receiving and depositing solid waste at your facility and to cover all exposed waste immediately upon receipt of this letter, violations and deficiencies supporting this order include:

1. You are constructing and operating a disposal facility without a permit.

2. Permit application was submitted subsequent to commencing construction and operation. An inspection on 19 April 1982 found the following:

a. Uncovered waste from previous day(s).

b. Cells not constructed as shown on application and waste not adequately compacted.

c. 4" diameter under drain in inadequate size.

d. 4" diameter under drain as

installed would not relieve ponding upstream to fill.

e. Operator was scraping irregularly located areas in either hillside, defeating run-off diversion and posing sedimentation problems.

f. Operator was not cutting cell bottom bench patterns in hillsides as shown on drawing.

g. Upstream storm water detention pond overflows into upper end of waste accumulation.

h. Waste was dumped to several feet deep around boles of trees to 14" or more diameter.

i. Leachate drainage system is uncertain.

j. No provision discernable for continuing leachate collection as fill progresses upstream.

k. Location of gas line not marked.

l. Springs on hillside are below diversion ditch.

m. Cutting in areas of springs is precipitating slides.

3. Leachate discoloration is traceable to and below confluence with main Mundy Hollow stream.

4. Old area is not adequately closed:

a. Waste is exposed on top surface and fill face as well as face of second pond impoundment.

b. Leachate is issuing from fill face. Leachate at south westerly end is bypassing first pond.

c. Runoff is not diverted. Lengthy diversion ditch to pond above filling operation discussed in Item 1 above has extremely limited capacity and will be difficult to maintain.

d. Both existing leachate ponds are septic.

e. Vegetation of all bare earth surface is needed.

You are further ordered to correct all violations at the old area within 30 days. Authorization to begin operating at the new location will not be given until the corrections noted under Item 2 above and the plans are satisfactory, and

assurance of ability to maintain compliance is submitted.

Sincerely,

Robert P. Wheeler, Director
Office of Environmental
Health Services

RPW/DP/mwg
cc: Charles Saber
Jim Kay
Karen Watson